NO. 84632-4

SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE CENTER FOR ENVIRONMENTAL LAW AND POLICY, AND SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF ECOLOGY, AND EASTERDAY RANCHES, INC.,

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION, NORTHWEST DAIRY ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

RESPONDENTS STATE OF WASHINGTON'S AND DEPARTMENT OF ECOLOGY'S ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

Five Corners Family Farmers, Scott Collin, the Center for Environmental Law and Policy and Sierra Club (collectively referred to as Five Corners Family Farmers) appeal a Superior Court Order granting summary judgment to Easterday Ranches, the State, and a number of intervenor associations on a question of statutory interpretation. In response to a request for a declaratory judgment, the Superior Court ruled that "RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." Order on Cross-Motions for Summary Judgment at 5 (May 5, 2010) (Order).

The State agrees that legal issues involving water resources are important and that many individuals and groups are interested in the issue in this case. However, not every case presenting questions of water law involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by the Supreme Court. RAP 4.2(a)(4). Where a water law case involves the application of standard principles of statutory construction, as in the case here, there is no reason for the appeal to be heard directly by the Supreme Court.

Moreover, when considering whether a matter calls for prompt resolution by the Supreme Court, Appellants' diligence in pursuing

judicial relief should be considered. Here, Appellants take issue with a statutory interpretation that they maintain originated with a 2005 Attorney General's Opinion. They describe the opinion as having represented a significant change by the state with dire consequences to the interests they represent.[1] Appellants' Statement of Grounds for Direct Review (Statement of Grounds) at 3-4. Despite their concerns with the 2005 interpretation, Appellants nonetheless waited until June 2009 to file their declaratory judgment action. Their delay of nearly four years in seeking judicial relief belies Appellants' claim that this issue requires prompt resolution by the Supreme Court.

Appellants' objection to the Legislature's policy choice to exempt certain groundwater uses from permitting requirements does not provide grounds for direct review. Because the Legislature has addressed the topic by plainly providing exemptions, the issue presented by this case does not meet the criteria for direct review.

[1] Appellants assert that Ecology in 2005 "began allowing" permit-exempt uses for stock-watering purposes in unlimited quantities. Statement of Grounds at 4. This statement mischaracterizes the historical record which reflects, since 1945, at least four different agency interpretations of the stock-watering exemption. Defs.' Mem. Supp. Cross Mot. Summ. J. at 21 (Feb. 18, 2020); excerpt attached as Appendix A. More fundamentally, the statement miscomprehends the core of this case – that Ecology does not "allow" permit-exempt uses. Rather, the Legislature has made their establishment exempt from Ecology permit application review.

II. ISSUE PRESENTED FOR REVIEW

The issue presented by Appellants:

Is the exemption from groundwater permitting for stock-watering purposes contained in RCW 90.44.050 limited in quantity?

III. PROCEEDINGS BELOW

This declaratory judgment action raised a question of statutory interpretation regarding the scope of an exemption from permitting for withdrawals of groundwater for "stock-watering" purposes. The statute in question provides:

> After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: *EXCEPT, HOWEVER, That* ***any withdrawal of public groundwaters for stock-watering purposes****, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day,* ***is and shall be exempt from the provisions of this section****,* but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090

> may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

RCW 90.44.050 (emphasis added).

The Superior Court found the statutory language unambiguous and concluded that the statute's plain meaning is that "permit–exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." Order at 5. When the Attorney General considered the same issue in 2005, he also found the statute unambiguous and applied the plain meaning rule to reach a conclusion identical to that made by the Superior Court. Op. Att'y Gen. 17 (2005), at 3-7.[2]

Both the Superior Court and the Attorney General applied the plain meaning rule to the issue before them. Under the rule, the plain meaning is derived from what the Legislature has said in the subject statute and related statutes. Where only one reasonable meaning can be discerned from the statute's language, that "plain meaning" is said to express the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

In their arguments below, Five Corners Family Farmers asked the court to overlook the statute's plain language exempting "***any*** withdrawal of public groundwater for stock-watering purposes" from the requirement

[2] Attached as Appendix B is Op. Att'y Gen. 17 (2005).

to obtain a groundwater permit and to instead impose quantity limits on this permit exemption that the Legislature did not prescribe. Appellants argue that a limit on permit-exempt groundwater use for stock-watering purposes can be based on either of two readings of the statute. Statement of Grounds at 6, 9. One reading lumps listed permit-exempt uses into a "bundle of uses" that are cumulatively limited to 5,000 gallons per day (stock-watering combined with domestic and lawn and noncommercial garden watering). The other reading classifies stock-watering activities as a type of industrial use which the statute limits to 5,000 gallons per day. Statement of Grounds at 9.

The State and other Respondents demonstrated that both of these statutory interpretations should be rejected. First, rather than lumping all types of permit-exempt uses into a "bundle of uses" that are cumulatively limited to 5,000 gallons per day, the statute expressly identifies four separate categories of uses (stock-watering, lawn or non-commercial garden, domestic, and industrial).[3] The statute limits two of these categories, domestic and industrial, each to a numeric quantity of 5,000 gallons per day. The statute limits the third category (lawn or non-commercial gardens) to an acreage (one-half acre) amount. As to the

[3] In 2003, the Legislature added a fifth exemption category as a subset of the domestic use exemption by referencing RCW 90.44.052 which authorized the Whitman County cluster housing pilot program. Laws of 2003, ch. 307.

fourth category (stock-watering), the statute includes neither a numeric nor an acreage limit and, in fact, emphasizes the absence of such a limit by use of the word "any" ("any withdrawal of public groundwaters for stock-watering purposes").[4]

Appellants' other reading seeks to classify stock-watering as a type of industrial use to bring it within the 5,000 gallons per day limit on permit-exempt industrial uses. Statement of Grounds at 9. The State and Respondents have shown that the language of the statute does not support Appellants' alternative reading. The statute creates four separate categories of use, one of which is for stock-watering purposes. Nothing in the statute brings stock-watering under the umbrella of industrial use. Moreover, Appellants' reading would render superfluous the separate stock-watering purposes category. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (all language in a statute is to be given meaning).

[4] This is not to say that stock-watering rights established under the authority of the exemption are unlimited. As with any type of water right, permit-exempt stock-watering rights may not impair more senior rights and may not waste water. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80-98, 11 P.3d 726 (2000) (new appropriations cannot cause an impairment of existing water rights); *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 472, 852 P.2d 1044 (1993) (waste of water is unlawful and water use must be "a reasonable and economical use of the water in view of other present and future demands upon the source of supply").

IV. REASONS WHY THE COURT SHOULD DENY DIRECT REVIEW

This is a case involving statutory interpretation, where the Appellants would ignore plain language in RCW 90.44.050 and read into the statute additional limits that the statute does not contain. The Legislature knew how to limit permit exemptions in RCW 90.44.050 and it did so expressly in the statute's other exemptions related to lawn and noncommercial gardens, domestic, and industrial purposes. It imposed no such additional limitations on withdrawals for stock-watering purposes. Consistent with the statute's language, the Superior Court correctly concluded that "RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." Order at 5. This issue does not meet the criteria for direct review in RAP 4.2(a)(4).[5]

A. Legal questions involving water supply and regulation do not always implicate issues of broad public import.

Appellants suggest that this case is appropriate for direct review because "[w]ater supply and regulation almost always implicate issues of broad importance to the public" and because this case arises in the context of agriculture - an important state industry. Statement of Grounds at 13-14.

[5] Appellants do not rely on any of the other RAP 4.2(a) criteria for direct review.

The State agrees that legal issues involving water resources are often important and that many individuals and groups are interested in the issue addressed by this case. However, not every case presenting questions of water law involves a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination" by the Supreme Court. RAP 4.2(a)(4). When resolution of a water law question simply involves the application of standard principles of statutory construction, as with the issue presented in this appeal, the case is appropriately heard by the Court of Appeals.

Both the Attorney General in 2005 and the Superior Court this year reviewed the subject statute and related statutes and found the provisions addressing whether the exemption from groundwater permitting for stock-watering purposes is limited in quantity unambiguous. Applying the plain meaning rule, they each concluded that permit-exempt uses of groundwater for stock-watering purposes are not subject to a quantity limit. While the Appellants have a right to appeal this issue, the ruling of the Superior Court is strongly rooted in the plain language. As such, the issue is not "fundamental" and is appropriate for the appeal of right to the Court of Appeals.

Nor is there any showing of urgency. Instead, the issue had been known to Appellants for nearly four years before they pursued a judicial

resolution. Delay in bringing this case in the first instance undermines their claim that the issue now requires prompt resolution by the Supreme Court.

Finally, this is not a case that will necessarily require a final decision by this court. The issue could be decided by the Court of Appeals without presenting any conflict among case law, and thus never meet the criteria for discretionary review in RAP 13.4(b).

B. This case is not similar to either Dep't of Ecology v. Theodoratus or Lummi Indian Nation, et al. v. State of Washington

In support of their position, Appellants cite two cases involving water resources that were the subject of direct Supreme Court review, *Dep't of Ecology v. Theodoratus,* 135 Wn.2d 582, 957 P.2d 1241 (1998), and *Lummi Indian Nation v. State of Washington,* Case No. 81809-06 (pending). Neither cited case, however, is analogous to this case.

In *Theodoratus*, the Court was asked to address issues at the heart of western water law, issues related to the perfection of a water right and the meaning of beneficial use. More specifically, the Court determined whether a final certificate of water right could be issued based on the capacity of a developer's water system or only based on the amount of water actually put to beneficial use and whether beneficial use was defined or applied in a unique way for public water supply systems. *Theodoratus*,

135 Wn.2d at 586, 594. In answering these questions, the Court examined several water statutes and considered rulings in a number of State Supreme Court cases. *Theodoratus*, 135 Wn.2d at 589-594. In contrast, the instant case involves the meaning of a single statutory exemption to permitting for groundwater withdrawals.

Lummi Indian Nation is also markedly different. That case involves constitutional challenges, based on separation of powers and due process theories, to seven provisions of the so-called Municipal Water Law of 2003, ESSHB 1338. Moreover, the Superior Court in that case ruled in favor of the challengers with regard to three provisions of the law, making the case appropriate for direct Supreme Court review under RAP 4.2(a)(2) (where a trial court has held invalid a statute on constitutional grounds).

Water cases are routinely addressed by the Court of Appeals, including cases of great import to a broad range of interest groups. For example, the Court of Appeals recently decided *Pacific Land Partners, L.L.C. v. Dep't of Ecology*, 150 Wn. App. 740, 208 P.3d 586 (2009), *review denied*, 167 Wn.2d 1007, 220 P.3d 209 (2009), a case involving the

interpretation of two exceptions to statutory relinquishment.[6] RCW 90.14.180; 90.14.140. Perhaps even more straightforward a case than *Pacific Land Partners*, the instant case presents only a single statutory construction question. As such, it does not meet the grounds for direct Supreme Court review.

C. Appellants' objection to the policy embodied in the exemptions from permitting is not a reason for direct review.

Permitting of new groundwater uses involves consideration of water availability, impairment to other water rights, and potential impacts to the public interest. RCW 90.44.050; RCW 90.03.290. Because they are exempt from permitting, these factors are not considered prior to the establishment of uses listed in RCW 90.44.050. In areas with limited surface and/or groundwater supplies, one can question the wisdom of exempting any new water uses from permit review. However, where the Legislature has plainly addressed the issue, arguments regarding the

[6] Other water law cases recently decided by the Court of Appeals include: *see also, e.g., City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008) (appeal of Ecology's decision to deny an application for change of a water right involving interpretation of statutory exceptions to relinquishment of water rights); *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 135 P.3d 515 (2006) (challenge to Ecology administrative order requiring water right holder to reduce their water use, including ruling that "futile call doctrine," which provides that a senior water appropriator may prevent a junior appropriator from diverting water only when doing so will be of some benefit to the senior appropriator, is not recognized under Washington Law); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 110 P.3d 812 (2005), *review denied*, 156 Wn.2d 1004, 128 P.3d 1239 (2006) (appeal of Ecology's order of relinquishment of a water right involving, among other issues, a constitutional challenge to the administrative relinquishment procedure statute).

wisdom of a legislative policy choice must be made to the Legislature and do not provide grounds for direct Supreme Court review.[7]

The State agrees that permitting provides a valuable tool to manage new water uses. However, it is not the only tool. Importantly, all water rights, whether established through a permit process or through the so-called permit exemption, are subject to other requirements of water law, such as the water rights priority system and watershed basin rules requiring minimum instream flows and/or stream closures. *See* RCW 90.44.050 (the right associated with a permit-exempt withdrawal is "equal to that established by a permit issued under the provisions of this chapter."); *Campbell & Gwinn,* 146 Wn.2d at 1, 9, 43; Op. Att'y Gen. 6 (2009), at 13[8]; Op. Att'y Gen. 17 (2005), at 1-2, 4-5. This means that in a water short basin, a senior right has priority over a junior right, whether such junior right was established by permit or through a permit exemption. Thus, if a senior right is impaired by exercise of a junior right, the senior can pursue judicial relief against the junior. *See, e.g., State ex rel. Roseburg v. Mohar*, 169 Wash. 368, 375, 13 P.2d 454 (1932). Moreover,

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[7] Appellants' policy concerns appear to go beyond the exemption from permitting for stock-watering uses of groundwater and include all permit-exempt uses. *See* Statement of Grounds at 14-15 describing "thousands of users of exempt wells . . . drawing millions of gallons of water daily." This case is not about the wisdom of any or all of the permit exempt uses – it is about whether the Legislature made one identified permit-exempt use subject to a quantity limit.

[8] Attached as Appendix C is excerpt of Op. Att'y Gen. 6 (2009).

Ecology may close to new appropriations a particular water body (including groundwater bodies in hydraulic continuity with surface water bodies) that cannot support new water uses. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80-98, 11 P.3d 726 (2000). Such closures can apply to both new permitted uses and permit-exempt uses. Op. Att'y Gen. 6 (2009), at 12-13.

The fact that a groundwater right for stock-watering purposes is not subject to a quantity limit and does not undergo permit review at the time it is established, does not mean it is beyond reproach. The right is subject to all other water resource authorities, including authorities that are available to address impairment issues should they arise in the future. Appellants' dislike of the fact that the exemption from groundwater permitting for stock-watering purposes is not subject to a quantity limit does not make the statutory interpretation question presented by this case a basis for direct Supreme Court review.

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V. CONCLUSION

This Court should deny direct review in this matter and the case should be transferred to the Court of Appeals for determination.

RESPECTFULLY SUBMITTED this 24th day of June, 2010.

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